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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 814

AMERICAN EXPORT LINES, INC. AND ATLANTIC AND GULF STEVEDORES, INC., *Petitioners*,

v.

JOSEPH S. PROVENZA, *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION

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Question Presented

Are the "Safety and Health Regulations for Longshoring" admissible in evidence to determine whether the shipowner's duty to furnish a seaworthy vessel has been met? If so, are they binding in law?

Statement of the Case

Respondent accepts as substantially correct the Statement of the Case contained in the Petition for a Writ heretofore filed in these proceedings. The causes of action set forth in the declaration (the suit was initially filed in a State Court) sounded in unseaworthiness, negligence and statutory violation.

The beams were stowed on the inshore or working side of the deck and either unlashed or improperly lashed. The starboard winch cut out and a draft of cargo being loaded aboard swung back, struck some metal hatch beams stowed on the inshore or working side of the deck and caused one or more of them to be knocked on the plaintiff's legs, fracturing both of them. At the time he was injured, he was standing two or three feet from the beams; they were, accordingly, propelled this distance by the swinging draft.

Statutes and Regulations Involved

The precise sections of the "Safety and Health Regulations for Longshoring" involved in the case were:

"Section 9.43. Handling Beams and Covers

"(b) **Strongbacks** shall be laid on their sides or stood on edge close together and **lashed.** (Emphasis throughout added.)

"(c) Strongbacks, hatch covers and pontoons shall be so **placed as not to interfere with a safe walkway** from rail to hatch coaming or fore and aft, and **so secured that they cannot be tipped over** or dragged into hatches or overboard by drafts or gear. Dunnage or other suitable material shall be used under and between tiers of strongbacks and pontoons."

"Section 9.91. Housekeeping

"(d) Loose paper, **dunnage and debris shall be collected** as the work progresses **and** be **kept clear of** the immediate **work area.**"

(This last section was relevant because there was evidence to the effect the beams were placed on the inshore side at the hatch where the casualty occurred since the offshore side was cluttered with dunnage and debris. At all the other hatches, the beams were placed on the offshore or non-working side of the ship.)

Reasons for Denying the Writ

The lower court, in reaching its decision, did no more than combine two well-established principles of law, viz:

1. **The act of a stevedore or longshoreman can render a ship unseaworthy.**
2. **The violation of a statute can render a shipowner absolutely liable.**

That it was a logical and warranted application of the rationale of precedents in this and other federal courts is attested to by the fact the decision has served as the basis for several settlements executed since its publication. The most recent case to cite it with approval that has come to Respondent's attention is *Reid v. Quebec Paper Sales & Transportation Company, Limited, et al.*, United States District Court, Southern District of New York, 61 Ad. 1403 (Cooper, D.J., February 17, 1964).

In explanation of its disposition of the case, the lower court stated (App. 9a):

> **"The regulation casts upon the shipowner no new duty nor does it relieve him of any pre-existing duty.** Now, as before the regulation was promulgated, it is incumbent on him to supply a seaworthy ship. Now, as before, if the ship becomes unseaworthy through the act of the stevedore or anyone else, and this condition is the proximate cause of an injury, the shipowner is liable. **The legal duty is the same.** All that the regulation does is to define how this well-established duty shall be discharged in particular circumstances by the stevedore who has undertaken to perform the shipowner's nondelegable duty: 'beams shall be laid on their sides or stood on edge close together and lashed.' Section 9.43(b). **It prescribes a standard of safety, not a new duty.** Nothing in the regulation forbids its being mentioned to the jury."

The seaworthiness doctrine has been called the "Safety Appliance Act" of the maritime industry. The courts, in F.E.L.A. actions, have been most liberal in imposing liability on the railroads. In *Davis v. Wolfe*, 1923, 263 U.S. 239, 68 L. Ed. 284, 44 S. Ct. 64, Mr. Justice Sanford synopsized the holdings of earlier cases, 242:

> "The rule clearly deducible from these four cases is that . . . he can recover if the failure to comply with the requirement of the Act is a proximate cause of the accident resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection."

This budding principle of law came into full bloom on the Admiralty side in the case of *Kernan v. American Dredging Co.*, 1958, 355 U.S. 426, 2 L. Ed. 2d 382, 78 S. Ct. 394, one of the most significant decisions to come out of this Court in recent years.

The case involved a petition for exoneration from or limitation of liability filed by the owner of a tug which was enveloped by fire while passing a riverfront refinery. A decree for the tug-owner was entered by the U. S. District Court for the Eastern District of Pennsylvania (141 F. Supp. 582) and affirmed by the Court of Appeals for the Third Circuit (235 F. 2d 618). This court reversed and remanded, holding that recovery was permissible under the Jones Act for the death of a seaman resulting from the violation of a duty under a rule promulgated pursuant to a statute concerning light equipment on the tug without any showing of negligence.

The factual backdrop of the case was as follows: A seaman lost his life on a tug, which, while towing a scow, caught fire when an open-flame kerosene lamp on the deck of the scow ignited highly inflammable vapors lying above

an extensive accumulation of petroleum products spread over the surface of the river. The trial court found that the lamp was not more than three feet above the water. Maintaining the lamp at a height of less than eight feet, violated a navigation rule promulgated by the Commandant of the United States Coast Guard.

The Court explained the contention of the widow of the seaman, p. 428,

> "The petitioner urges first that the **statutory violation made the flotilla unseaworthy, creating liability without regard to fault.**"

then set forth the issue (431):

> "The question for our decision is whether, in the absence of any showing of negligence, the Jones Act — which in terms incorporates the provisions of the FELA — permits recovery for the death of a seaman resulting from a violation of a statutory duty."

and succinctly concluded:

> "We hold that it does."

By way of explaining the reasoning behind its decision, the court commented (432):

> "The FELA and the Jones Act impose upon the employer the duty of paying damages when injury to the worker is caused, in whole or in part, by the employer's fault. This fault may consist of a breach of the duty of care analogous but by no means identical to the general common law duty or of a breach of some statutory duty."

Further on, it observed (433):

> "Since it appears in this case that the defect or insufficiency of the flotilla's lighting equipment resulting from the violation of 33 U.S.C., section 157, actually caused the seaman's death, this principle governs and compels a result in favor of the petitioner's claim."

Still drawing on the body of decisional law under FELA, the Court went on to add this important dictum (438):

> "We think that the irrelevance of the safety aspect in these cases demonstrates that the **basis of liability** is a **violation of statutory duty** without regard to whether the injury flowing from the violation was the injury the statute sought to guard against."

The FELA and the Jones Act extension of the General Maritime Law are, as we know, predicated on an employer-employee relationship. Neither the railroad nor the shipping industry has a workmen's compensation act covering its employees. Obviously, longshoremen differ from railroaders and "members of the crew seamen" in that respect.

These considerations lead to the question — What is the effect of the new safety regulations? Vis-a-vis the stevedore, since the right to compensation was already wellnigh absolute, the new regulations do not change the status of the longshoremen. Before March 21, 1960, he could recover without regard to fault; after that date, he can still recover without regard to fault. His status with respect to his immediate employer remains unchanged.

What about his status with reference to the shipowner whose vessel he is loading or discharging? With responsibility for observance of the safety regulations imposed on the shipowner through the stevedore, the courts will have a statutorily created set of "safety rules" by which to measure the conduct of the shipowner and determine whether it is satisfying its absolute duty to furnish a seaworthy ship.

In the *Kernan* case, supra, this Court affixed liability for injury and death to the violation of a "navigational" rule rather than a "safety" statute. To allow recovery when a technically unrelated statute was violated, it relied upon a

line of cases holding railroads liable when what might be described as "off target" injuries were sustained by railroad employees as a result of a statutory violation.

The new regulations are expressly designed to promote the safety and health of longshoremen. Did not a violation thereof give the lower Court an even stronger reason for achieving the same result?

The ruling of the lower court was correct and in complete harmony with the spirit and rationale of *Kernan*, and the solicitous interest of this court in the welfare of maritime employees, be they "members of the crew" seamen or longshoremen. It is submitted the lower court spoke with irresistible logic when it said (App. 9a):

> "Now, with respect to longshoring, the statute law of the United States has laid down definite standards, and we think the plaintiff longshoreman is entitled to have those standards applied to both the defendants in this case."

Another illuminating excerpt from the opinion reads (App. 10a):

> "If the stevedore makes the ship unseaworthy by violating a prescribed safety regulation, the statute says nothing either to absolve the owner from liability or to foreclose reference to the regulation in an effort to show that the condition which the stevedore caused or permitted fell short of recognized safety standards. **The owner's duty does not stem from the regulation.** . . ."

For decades, the great legal philosophers and writers have been decrying the "conspiracy of silence" which exists with respect to medical negligence or malpractice cases. In the vast majority of our jurisdictions it is virtually impossible to procure testimony to establish that the accused practitioner has deviated from the standard of care prac-

ticed in the community. The petitioners would have this court sanction the gagging of the lower court — to place its imprimatur on a "**conspiracy of silence**" with reference to the safety regulations. This, it is submitted, would convert the regulations into treacherous mockeries.

The regulations were designed to make working conditions safer for longshoremen and to prevent accident in one of our nation's most hazardous industries. With unassailable logic, the lower court observed (App. 10a):

> "We fail to see how it can possibly further this purpose to impose a **rule of silence in respect to the regulations.**"

The safety regulations create no new duty for the shipowner. Here in America it has been settled law at least for the past 6 decades that a shipowner has the absolute, inalienable and nondelegable duty to furnish a seaworthy ship. The net effect of the regulations is to explain, in part, this absolute duty for the benefit of our "landlubber" juries. The Safety Appliance Act and the seaworthiness doctrine impose probably the most stringent liability in our law. The safety regulations do not expand and enlarge the doctrine — they merely assist in its interpretation by setting forth a statutory standard by which it may be measured.

Conclusion

It is submitted the lower court, in reaching its salutary decision, merely blended the two following principles of humanitarian maritime law recognized by this Court:

1. The act of a stevedore or a longshoreman can render a ship unseaworthy.
2. The violation of a statute can render a shipowner absolutely liable.

By reason of the applicability of the safety regulations, the shipowner, instead of being exposed is really protected. If its liability is attributable to a violation of a safety regulation by the stevedore, the longshoreman is protected by his verdict and the shipowner is assured its recovery over. The economic cost is placed where it equitably belongs.

For the reasons developed in the Argument and summarized immediately above, this Court is urged to deny the petition for a writ of certiorari.

If, despite the cogency of the above reasons, the Court should decide to grant the writ, it is respectfully submitted the entire case should be reviewed and these additional points considered:

1. Did the lower court commit reversible error in its charge to the jury by:
   a. Devitalizing the doctrine of seaworthiness and destroying the absolute nature of the warranty through overemphasizing, with undue repetition, what it deemed its negative aspects and through deemphasizing its affirmative nature.
   b. Telescoping the unseaworthiness and negligence causes of action into one.
   c. Charging it could find that the negligence of the plaintiff was the sole proximate cause of the accident.
   d. Characterizing plaintiff's legitimate claim as "sort of a shell game".

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a. In defining the term seaworthiness in the charge proper, the term "reasonable" was used 13 times; the word

"absolute" appeared once. In answering questions of the jury, "reasonable", in one guise or another, was used an additional 22 times — a grand total of 40 times.

In defining negligence, the word "reasonable" or one of its derivatives was used a total of only 11 times.

In explaining the warranty of seaworthiness to JUDGES and LAWYERS -- not to a lay jury -- this Court in *Mitchell v. Trawler Racer, Inc.*, 1960, 362 U.S. 539, 4 L. Ed. 2d 941, 80 S. Ct. 926, used the word "absolute" 6 times and "reasonable" in one of its forms only 3 times.

b. The Court charged, in part, as follows:

> "Under the facts of this case, I think it is impossible unless you first find that the ship was unseaworthy, for you to find that the shipowner was negligent. I think I explained to you that the degree of proof is much less in reference to unseaworthiness. Therefore, I must instruct you that, if you find for the shipowner on the question of unseaworthiness, if you find that the ship was not unseaworthy, you must also find for the shipowner on the question of negligence and return a verdict in its favor."

This portion of the charge amounted, in effect, to a directed verdict in favor of the shipowner on the issue of negligence. It denuded the longshoreman of one half of his suit, since the remaining causes of action were predicated on unseaworthiness and negligence. The jury may have thought the inert presence of the metal beams on the inshore or working side of the ship did not technically render the deck unseaworthy, and yet have concluded their presence there was a condition which negligently exposed the plaintiff to danger.

c. The part of the charge which instructed:

> "If you find from the evidence that **negligence** on the part **of the Plaintiff** . . . was the **sole proximate**

> cause of the accident, then the Plaintiff cannot recover from the Defendant shipowner, and your verdict should be in favor of both American Export Lines and Atlantic and Gulf Stevedores, both of them."

was fatally defective. By no stretch of the imagination could the Plaintiff's conduct be construed as the "sole proximate cause" of the mishap. He certainly didn't pick up the beams weighing a ton or more and heave them at himself. The casualty was brought about by the concurrence of several factors.

d. The portion of the charge which asserted:

> "I must say that this type of thing is somewhat confusing even to lawyers, where they say, in effect, you can't sue your employer, but you can sue somebody else and recover damages against the third party, and the third party turns around and said to the employer, well, you give it to me, it is **sort of a shell game**, you might say, but it is not for us to determine that, and it is the law of indemnity that has arisen much after the admiralty law came into existence."

was extremely prejudicial to the longshoreman. It contaminated his case — gave a shady, almost underworld, sordid quality to his thoroughly honest and legal claim for damages. Although the unfair characterization was unintentional on the part of the court, it nevertheless was bound to have an adverse effect on the minds of the jury.

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